Province of
British Columbia

# ANNUAL REPORT
# 1982

# LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

# LAW REFORM COMMISSION OF BRITISH COLUMBIA

## ANNUAL REPORT
## 1982

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LRC 60

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TABLE OF CONTENTS


| | Page |
|---|---|
| **I General** | 1 |
| **II The Future of the Commission** | 1 |
| A. *Introduction* | 1 |
| B. *The Salary Issue* | 1 |
| C. *The Restraint Crisis* | 2 |
| D. *Our Observations* | 4 |
| (a) *The Salary Issue* | 4 |
| (b) *Restraint and the Role of the Commission* | 4 |
| E. *The Future* | 6 |
| **III The Commission's Premises** | 6 |
| **IV Personalia** | 6 |
| **V The Program** | 7 |
| A. *Carrying out the Program* | 7 |
| 1. Research and Writing | 7 |
| 2. The Consultation Process | 8 |
| B. *Priorities* | 8 |
| C. *The Projects* | 8 |
| 1. Debtor-Creditor Relationships | 9 |
| (a) The Crown as Creditor: Priorities and Privileges | 9 |
| (b) Reviewable Transactions | 9 |
| (c) Bulk Sales Legislation | 9 |
| (d) Joint Liability | 9 |
| 2. Personal Injury Compensation | 10 |
| (a) Periodic Payments | 10 |
| (b) Compensation for Non-pecuniary Losses | 10 |
| (c) Family Compensation Act | 10 |
| 3. Applicability of English Statute Law | 10 |
| 4. Arbitration | 11 |
| 5. Civil Procedure | 11 |
| (a) Foreign Money Liabilities | 11 |
| (b) Peremptory Challenges and Civil Jury Trials | 12 |
| (c) The Review of Jury Awards | 12 |
| (d) Interest and Jurisdictional Limits in the County and Provincial Courts | 12 |
| 6. Estates Projects | 13 |
| (a) The Interpretation of Wills | 13 |
| (b) Statutory Succession Rights | 13 |
| (c) Presumptions of Survivorship | 13 |
| (d) The Effect of Testamentary Instruments | 14 |
| (e) Probate Procedure and Administration | 14 |
| 7. Office of the Sheriff | 14 |
| 8. Illegal Contracts | 14 |
| 9. Covenants in Restraint of Trade | 15 |
| 10. Aspects of Family Law | 15 |
| (a) Interspousal Immunity in Tort | 15 |
| (b) Miscellaneous Causes of Action | 15 |
| (c) Breach of Promise of Marriage | 15 |

TABLE OF CONTENTS—*Continued*


PAGE

11. Competing Rights to Mingled Property: Tracing and the Rule in *Clayton's Case* 15
12. Defamation 16
13. Subjects of Interest 16

**VI The Availability of Commission Publications** 16

**VII The Impact of Commission Recommendations** 17
A. *Legislation* 17
B. *The Non-legislative Role of the Commission's Work* 17

**VIII Acknowledgements** 18

**Appendix A—Reports and Recommendations Made by The Law Reform Commission of British Columbia** 21

**Appendix B—Matters Under Consideration** 25

**Appendix C—Minor Report: Interest and Jurisdiction Limits in the County and Provincial Courts (LRC 59)** 26

To the Honourable Allan Williams, Q.C.
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present its Annual Report for 1982, outlining the progress made by the Commission during that year.

## I GENERAL

During the past year, major Reports were submitted to you on Arbitration, Presumptions of Survivorship, The Crown as Creditor: Priorities and Privileges, and Interpretation of Wills. A minor Report was submitted on Interest and Jurisdictional Limits in the County and Provincial Courts. The Commission has also issued Working Papers on Interspousal Immunity in Tort, Statutory Succession Rights, Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case, Peremptory Challenges in Civil Jury Trials, and Illegal Contracts. These documents are described in greater detail below.

As presently constituted the Commission consists of five members: the Chairman, The Honourable Mr. Justice John S. Aikins; and Messrs. Kenneth C. Mackenzie, Bryan Williams, Q.C., Professor Anthony F. Sheppard and Arthur L. Close. Messrs. Mackenzie, Williams and Sheppard serve on a part-time basis. Details of the appointments of our members may be found in previous Annual Reports.

## II THE FUTURE OF THE COMMISSION

### A. INTRODUCTION

On its face, 1982 was a most productive year for the Commission. The production of five Reports and five Working Papers is an enviable record for an agency our size. This productivity was achieved, however, in the face of two developments having an adverse impact on the Law Reform Commission and which have raised serious questions concerning its future. The purpose of this section of our Annual Report is to describe those developments, offer our observations on them, and to consider their implications.

The developments referred to are, to a degree, inter-related in that they concern proper funding for law reform activity. The first is the difficulties in implementing proper salaries for the Commission's full-time legal staff. The second concerns the way in which "restraint" measures, made necessary by the significant decline in provincial revenues, have been applied to the Commission. Both developments are described in greater detail below.

### B. THE SALARY ISSUE

Historically, each full-time member of the Commission's legal staff has been appointed by Order-in-Council, at a salary level specified in that Order. From time to time additional Orders-in-Council are issued to adjust the salary level of an employee. While the *Law Reform Commission Act* does provide for certain of its staff members to be appointed pursuant to the *Public Service Act*, this approach has never been adopted for two reasons. First, it was felt that to proceed by way of Order-in-Council enhanced the independence of the Law Reform Commission, both in terms of appearance and substance. Secondly, it

provided the Commission with the flexibility to pay slightly more than the "going rate" for Government lawyers in order to recruit exceptionally qualified staff members.

This approach worked well for many years. We were able to recruit satisfactory applicants at satisfactory salary levels and reasonable salary adjustments were made at appropriate intervals. In recent years, however, it became clear that this approach was no longer working efficiently. Salary adjustments, through Orders-in-Council, were not being made in a timely fashion and the salaries paid to the Commission's legal staff had fallen significantly behind the salaries paid to other lawyers within Government.

This problem was raised with officials within the Ministry early in 1981 but no tangible action was taken until November. At that time it was agreed that the following approach should be taken to set and maintain salary levels for our legal staff. The principle to be adopted was that Commission lawyers should be paid the same salaries as lawyers within Government of comparable experience bearing comparable responsibilities. Job descriptions would be developed for the positions in issue which would then be put to an outside body to assess these positions in accordance with a scheme established to rate lawyer-occupied positions within Government. New Orders-in-Council would then be raised, incorporating by reference the salary levels paid to Government lawyers occupying similarly rated positions, without specifying any actual figures. Commission employees were also to receive certain other benefits enjoyed by Government lawyers generally. Similar machinery was adopted two years earlier with respect to the Commission's support staff and it has worked quite well. We thought it desirable to adopt this approach despite the loss of some flexibility with respect to recruiting.

We were told that this process would likely be completed before the end of 1981. That goal was not realized, and the rating procedures continued into 1982, until February when the Premier of the Province announced the Compensation Restraint Program. At that point the rating process was terminated. The Commission continued to press for action on the salary issue, and it was resolved late in 1982 only after the size and constitution of the Commission's legal establishment was significantly altered by other events.

## C. THE RESTRAINT CRISIS

In 1982, as part of the Attorney General's estimates, the Law Reform Commission was voted, in vote 19, the sum of approximately $424,000 to carry out its program. That sum was intended to cover matters such as salary and general overhead. This we characterize as "operational support." The Commission also receives "administrative support" valued at approximately $150,000 which includes matters such as the Commission's premises and telephones, postage and the services of the Ministry's accounting arm. The amount voted contemplated that the Commission's "establishment" of full-time personnel would include, in addition to the Chairman, five full-time lawyers and a support staff of three.

The decline in Provincial revenues which were becoming apparent in early 1982 made it clear that it would be inappropriate for us to proceed as if the full amount of the vote would be available. Accordingly, we terminated our recruiting to fill one vacant staff position, and instituted a review of our procedures to see what other economies could be achieved which would not significantly impair our productivity or usefulness.

In late July, at a meeting with the Attorney General and Deputy Attorney General, the Chairman of the Law Reform Commission was told that, owing to the declines in Provincial revenues, full operational funding for the Commission must cease before the end of 1982 and it was suggested that the Commission approach the Law Foundation of British Columbia for alternative funding which would keep the core of its structure intact and would enable the Commission to proceed with its program, albeit on a reduced scale. If such funding were made available, the Government would continue to provide the "administrative support" referred to above.

Accordingly, the Commission resolved to approach the Law Foundation for a grant which would enable it to sustain its operations until the end of the next financial year, March 31, 1984. Our first task was the preparation of a wholly new budget for the relevant period, one which would keep the Law Reform Commission alive but which would result in a significant reduction of the resources available to it. This "restraint budget" reduced the amounts allocated to operational expenses by well over $100,000. While economies were achieved under all budget headings, the most significant savings would be achieved through a contraction of the Commission's establishment. The restraint budget contemplated that the Commission would operate with one less part-time Commissioner, have its legal staff reduced by two members and its support staff reduced by one person. The restraint budget provided realistic salary levels for those staff positions retained. It was on the basis of the restraint budget that the Commission approached the Law Foundation for funding for 17 months.

The Commission's application which included extensive supporting materials, was considered by the Law Foundation on October 4, 1982. The Law Foundation appeared to approach the Commission's application with the philosophy that it was prepared, for the 17 months, to share equally with Government the total overall cost of maintaining the Law Reform Commission in accordance with the restraint budget. In the result, they gave the Commission a grant which was equal to one-half of the combined total of the amount of the restraint budget and the estimated value of the Government's "administrative support" over that 17-month period. We, therefore, received a grant of $305,000.

The Foundation's grant was subject to two conditions, one implicit and one explicit. The implicit condition is that Government would provide sufficient funding toward the Commission's operational expenses so that, when combined with the grant, an amount equal to the "restraint budget" is realized. This is a matter on which the Government, of course, can give no explicit commitments as funding in relation to the 1983/84 financial year must be voted by the legislature. The other condition related to the salary levels of the Commission's legal employees. The Law Foundation, apparently sympathetic to the difficulties the Commission had faced in achieving proper salary levels, made the grant conditional on the salary levels set out in the restraint budget being implemented.

Throughout October and November, the Commission, with the assistance of the Ministry of Attorney General attempted to comply with this term of the grant by putting the appropriate salaries in place. During this period matters were further complicated by the resignation of the Commission's Counsel. Finally, on December 16, 1982 the necessary Orders-in-Council with respect to salaries were passed and the grant became fully effective.

## D. OUR OBSERVATIONS

### (a) *The Salary Issue*

The whole process of attempting to achieve appropriate salary levels for our legal employees was a most frustrating one for the Commission and was highly detrimental to morale. Two key Commission employees were affected. Throughout they were paid at salary levels established in 1979 and 1980. During the same period, one of extremely high inflation, they had seen lawyers employed directly by Government receive substantial increases. This process consumed an inordinate amount of time. At least four special meetings of the full Commission were called to deal with it and the inroads which it made on the Chairman's time were significant. All of this time could have been much more usefully spent on the proper work of the Commission.

Our impression is that the difficulties which we met concerning salaries cannot be blamed on any particular individual or group. We think, rather, those difficulties arise out of attempting to deal with the Commission's salary arrangements through a system which is geared to agencies whose relationship, and that of its employees, to Government is of a more conventional type. Whatever the source of the difficulties, steps should be taken to ensure that they do not recur. It is impossible for the Commission to recruit and hold research staff of the calibre needed for our work unless we can compensate them adequately.

### (b) *Restraint and the Role of the Commission*

The way in which Government approached the application of financial restraint measures to the Commission raises other concerns. It is recognized that in times of declining revenues steps must be taken to limit the expenditure of public funds. As an agency which relies on public funds, the Law Reform Commission cannot be immune from restraint measures to which others are subject. There is no quarrel with the proposition that the Commission should bear its fair share in assisting the Province during a period of financial difficulty. What the Commission faced in 1982, however, went beyond fair, if drastic, cutbacks in its budget. It faced the total termination of its operational funding and the spectre that it would be dissolved. That would be a most unhappy development for the Province and it is important to restate why there is a continuing need for a law reform agency such as the Commission.

A distinction must be drawn between the need for law reform, and the need for a Law Reform Commission. The need for law reform is obvious. Yesterday's law may be inappropriate today, and a law which is 300 or more years old may be not only inappropriate, but also obstructive, complex, difficult to understand, or generally unknown. The cost of inappropriate laws is injustice. Law reform is endlessly necessary.

There is a continuing need for advice on law reform to be carried out by a commission or agency exclusively devoted to that purpose. To a person who is not actually involved in law reform, that position may appear to be overstated. After all, the Uniform Law Conference has promoted useful reform. Subcommittees of the Canadian Bar Association, whose members specialize or are keenly interested in discrete aspects of the law, have generated useful reform. The same may be said for academics. Legal periodicals are excellent sources for articles focusing upon needed legislative amendments. Royal Commission, Government and Legislative Committees, and Legislative Counsel all have input into law reform.

It is easy to question the need for an agency that is exclusively devoted to law reform when so many other sources for promoting law reform exist. It is necessary to consider what the Law Reform Commission does to understand its unique role in the process of law reform.

The work of the Commission concentrates principally, although not exclusively, in areas having a high degree of legal complexity. This flows from its mandate to "simplify" the law. That which is in need of simplification must perforce be complex. Notwithstanding the focus on complex issues, the Commission's work is aimed at non-specialist readers, to gain a broad spectrum of comment from interested members of the community. The work consists of detailed legal research, policy formulation and wide-ranging public scrutiny before final recommendations are arrived at. The reason for this approach is to bring a full range of talents and backgrounds to bear on reform. Consequently, an elaborate and formal structure of liaison and consultation has been developed with the bar, judiciary and the universities. Our work is considered by a committee of judges (the Judges' Law Reform Committee), special committees struck by subsections of the Canadian Bar Association, and by committees of law professors established by the Faculty of Law, University of British Columbia, and the Faculty of Law, University of Victoria. In addition, *ad hoc* committees have been formed to consider the Commission's work.

None of the other forums for law reform have this capacity. Academics tend to write for publication with a specialist focus. The work of bar associations and sub-committees is essentially practise oriented. One cannot expect the necessary study of complex and obscure aspects of the law to be carried out by volunteers. The Uniform Law Conference deals with matters of national concern. They do not deal with matters of an exclusively local interest. Royal Commissions and other Government and Legislative Committees are usually concerned with wider questions of policy. None of these forums, notwithstanding the useful work they do, is able to fill the gap that would arise if the Law Reform Commission ceased to exist.

The Law Reform Commission serves the whole community by developing recommendations for modernized and simplified laws. The legal profession also benefits from that service. Moreover, the Law Reform Commission serves the legal profession by conducting and publishing detailed legal research. In many cases, statements of British Columbia law in Commission Working Papers and Reports can be found nowhere else.

Further, we believe that over the years the Commission has been "cost effective" in the sense that the saving in time and money that have been achieved by Government and individual citizens through modernized laws arising out of Commission work far outweighs the resources that have been devoted to it.

Systematic and continuous law reform is not a luxury. It is a necessary adjunct to a society governed by legislation and common law. It is important that it be performed by a body independent of the Government so that the interests of citizen and Crown can be impartially balanced. Two extreme alternatives to systematic law reform are legal disarray or drastic and radical change from time to time. The cost of either alternative is high. The Commission's achievements in common law reform and statutory modernization have been substantial and necessary. Without the Commission they would not, in many cases, have been done.

### E. THE FUTURE

The financial stability of the Law Reform Commission seems assured only to the end of March 1984, hence the Commission's long-term future is touched with uncertainty. What happens at that time may depend on the state of the provincial economy.

The Commission regards funding from the Law Foundation, on the scale received in 1982, to be a purely temporary measure designed to meet special circumstances. One cannot, however, rule out the possibility that funding from the Law Foundation or from other "outside" sources may be necessary in the longer term.

The members of the Commission, therefore, are sensitive to the possible need for a thorough examination of the role of an institutionalized Law Reform Agency in the Province, its relation to Government, the manner in which its program and priorities are developed, the ways and means of ensuring its long-term financial stability and the degree of independence it should have in managing its finances. Such an examination would be premature at this time, but it may be that in 1983 circumstances will then suggest that it is appropriate.

It hardly needs to be said that the Commission is most grateful to the Law Foundation for its prompt and generous response to the needs of the Commission at a critical time in its existence. There is little doubt that, had the Foundation responded less generously, the Commission by now would be defunct.

We also wish to thank the Attorney General and Deputy Attorney General and others in the Ministry for the assistance and support which they provided during this difficult time.

## III THE COMMISSION'S PREMISES

A positive development in 1982 was the Commission's move to new premises. This was foreshadowed in our 1981 Annual Report where, after referring to the need for more commodious premises, we stated:

> This matter was taken in hand in 1981 and we are happy to report that the process of rehousing the Commission in new premises is in its final stages. A suite of offices has been secured at the Toronto Dominion Tower, Fifth Floor, 700 West Georgia Street, Vancouver, which is currently being altered to suit our needs. These premises will provide the room we need to house our operation and allow for a degree of expansion. We expect our physical move will occur in April 1982.

The move did, in fact, occur as expected and the new premises have proven ideal for our needs. We wish to extend our appreciation to the members of the Facilities Management Unit of the Ministry of Attorney General and in particular to Messrs. Tom Morris and Chris Brambell for assistance and advice in connection with our relocation.

## IV PERSONALIA

During 1982 the Law Reform Commission lost the services of a significant number of persons who had been associated with its operation. This diminution of our establishment was a reflection of both natural attrition and a contraction of our operation as a result of expenditure restraint. We wish, at this time to express our thanks to those individuals whose services we lost during 1982.

PETER FRASER

Peter Fraser's term as a member of the Law Reform Commission expired in October 1982. He was the longest serving member of the Commission having been appointed in 1973. During that time he served both as a part-time Commissioner and, in 1978 and 1979, as acting Chairman of the Commission. During his time with the Commission Mr. Fraser participated in the development of 46 of the Commission's Reports, all of which bear, in one way or another, his mark. His is an outstanding record of achievement and service to the Commission and to the people of the Province. He brought an independent and thoughtful perspective to all aspects of Commission activity and his voice will be sorely missed by the remaining Commissioners. We wish him every success in his future endeavours.

ANTHONY SPENCE

Mr. Spence was Counsel to the Commission until November when he resigned to take up a position in the office of the Chief Judge of the Provincial Court. Mr. Spence first came to the Commission as a Legal Research Officer in 1976 and served in that capacity until 1979. After a year's absence to obtain his British Columbia call, he returned to the Commission as its Counsel. Mr. Spence has made a significant contribution to the work of the Commission and many of our Reports reflect his skill and insight. Of the Reports published in 1982, those on Arbitration and on the Crown as Creditor are ones to which he made a particularly large contribution. He will be greatly missed. We wish him well in his new position.

GAIL BLACK

Miss Black joined the Commission in 1981 as a Legal Research Officer. Her position was, unhappily, one of those which had to be eliminated in 1982. She is currently articling with a Vancouver law firm to obtain her British Columbia call. During her time with the Commission she did useful research in relation to matrimonial tort anomalies, breach of promise of marriage, and the law relating to loss of consortium. We are very grateful for her contribution to our work.

## V THE PROGRAM

### A. CARRYING OUT THE PROGRAM

#### 1. RESEARCH AND WRITING

The research to carry out the program calls for time-consuming work by qualified persons. This can be achieved by having the research done by personnel who are employed full-time, or by persons with special expertise who are retained on a part-time or occasional basis. Although in the early years the Commission relied heavily on outside consultants, our experience has led to a preference for the former approach. Consequently, most of the research and writing is now done by full-time members of the Commission staff.

One mechanism that is open to us, but which we have not used extensively is to create special committees to advise or report to the Commission on particular topics. The use of such committees is provided for in section 4 of the *Law Reform Commission Act*. We are considering constituting committees for two projects in 1983.

### 2. The Consultation Process

The Commission makes a general practice of inviting comment and criticism on its research and analysis before submitting a formal Report to you on any particular subject. This process of consultation greatly assists the Commission in developing proposals for the reform of the law that are both relevant and sound.

The chief means by which the Commission carries out this process is through the circulation of Working Papers to those who would find of interest the subject under study. A Working Paper sets out the views of the Commission, and the background on which these views are based, and invites comment.

Occasionally, when the topic under consideration makes wide circulation of a Working Paper inappropriate, copies of a draft Report may be given limited circulation for comment.

Whatever consultation mechanism is adopted, the tentative conclusions are thoroughly re-examined in the light of the comment and criticism received and final recommendations developed accordingly.

## B. PRIORITIES

The events of 1982 and the significant diminution of the Commission's resources has created the need for an urgent re-examination of the Commission's priorities. At the time when many of the projects described below were added to its program by the Commission or were referred to the Commission by the Attorney General, it was contemplated that our budget and staffing level would permit us to bring a majority of them to completion within a reasonable time. This can no longer be done.

The issue of which of the Commission's ongoing projects should be given priority has not yet been settled. Our internal discussions on this matter continue. In developing our priorities, however, we expect to be guided by the following considerations. First we believe it is desirable to concentrate on projects which will make the most efficient use of our limited resources. Secondly, we believe it is preferable to devote the Commission's energies toward the issuing of final Reports on those topics on which we have already circulated Working Papers for comment in preference to projects where no Working Paper has yet been issued. Finally, among those projects which have not yet been brought to Working Paper stage, we believe it is appropriate to prefer those to which the Commission has already committed substantial resources unless those projects also call for further time and work beyond the present resources of the Commission.

## C. THE PROJECTS

The description below is limited to those projects upon which Reports have been made in the past year or upon which work is in progress. Details of other Reports may be found in earlier Annual Reports. Included as Appendix A is a table setting out all Reports which the Commission has made to date, and references to legislation in which the recommendations have been implemented in whole or in part. In Appendix B, another table sets out those matters which are now under consideration.

## 1. Debtor-Creditor Relationships

### (a) *The Crown as Creditor: Priorities and Privileges*

The Crown, in its capacity as a creditor, enjoys a unique privilege under our law. One aspect of its special position is its prerogative right to prior payment. It also has the benefit of a large number of provincial statutes which create liens over real and personal property to secure money that is payable to the government or its agencies. Such liens tend to be legislated on an *ad hoc* basis and their scope and priorities are often uncertain. There is no evidence in the statutes of any uniform policy or of a consistent set of principles with respect to such liens.

In October, the Commission issued a Report (LRC 57) which examines the priorities and privileges of the Crown at common law and under statute. Recommendations were made for the abolition or modification of some of the Crown's special privileges and priorities with a view to rationalizing this area of the law and achieving an appropriate balance between the needs and expectations of government, its debtors, and third parties.

### (b) *Reviewable Transactions*

This project was originally envisaged as a study on the operation of the *Sale of Goods in Bulk Act*, *Fraudulent Conveyance Act* and *Fraudulent Preference Act*. Background research on the law respecting the current operation of these Acts is far advanced. The work done has led us to the conclusion that the *Sale of Goods in Bulk Act* can be dealt with discretely. Thus it has become a separate project and is described more particularly below. What remains is still a large project and we cannot predict with confidence when we will be in a position to issue a Working Paper.

### (c) *Bulk Sales Legislation*

When a merchant wishes to make a sale of a major portion of his assets, out of the usual course of his business, that transaction will normally be one which must comply with the *Sale of Goods in Bulk Act*, R.S.B.C. 1979, c. 371. That Act imposes certain formalities on the transaction. The purchaser must demand a list of the vendor's creditors and, before the sale can be consummated, those creditors must either be paid or a requisite number of them must consent to the sale or waive the protection of the Act. Where the Act has not been complied with, the vendor's creditors may call upon the purchaser to account for the goods and any proceeds realized on their resale.

The origins of the Act, and contemporary commercial practice, raise serious questions about its operation and utility. The Commission is in the final stages of developing a Working Paper which examines the origins and operation of the Act and sets out tentative proposals for reform. We hope to circulate that Working Paper early in 1983.

### (d) *Joint Liability*

There are a number of aspects to the project on joint liability. The first is an examination of the distinction between joint liability and joint and several liability, which can be crucial. For example, a judgment obtained against a person jointly liable will bar any action against the others with whom he is liable. If the liability is joint and several, judgment obtained against one will not bar an action against the others.

We are also considering an examination of the law concerning joint obligations and its relationship to the law of contributory negligence. In

particular, the provisions of the *Negligence Act* relating to the apportionment of liability, and rights of contribution among persons jointly liable, need to be examined. We expect to profit from the work of the Uniform Law Conference in this area. The work of the Conference in developing new uniform legislation is nearing completion.

## 2. Personal Injury Compensation

### (a) *Periodic Payments*

A project on personal injury claims was added to the Commission's program in 1978, largely as a result of the dissatisfaction with the present system of personal injury compensation that had been voiced in the Supreme Court of Canada and that arose out of work and studies in other jurisdictions. The scope and emphasis of the project were left undefined while background materials were gathered and certain preliminary research undertaken with a view to developing appropriate terms of reference.

Our work on this project has been discontinued. While we still believe this is an area in which changes in the law are urgently required, it has become clear to us that our present level of resources do not permit us to do the thorough work on which effective and credible law reform must necessarily be based.

### (b) *Compensation for Non-pecuniary Losses*

The Attorney General has requested that we undertake an examination of the "$100,000 ceiling" on damages in respect of pain, suffering and loss of amenities said to have been established in 1978 by the Supreme Court of Canada in the well known "trilogy" of personal injury cases. At the present time we are gathering background materials and monitoring current developments in the courts, including the impact of the more recent decision of the Supreme Court of Canada in *Lindal* v. *Lindal*, with a view to formulating more precise terms of reference for the study.

### (c) *Family Compensation Act*

Under the *Family Compensation Act* an action may be brought in respect of the death of a person where the death is caused by the wrongful act of another. The action may be brought only for the benefit of certain near relatives of the deceased, and the claim is limited to the loss of future pecuniary benefits that the deceased would have provided. There are a number of aspects of the Act and its operation which call for study. These include what the proper basis of compensation should be and who should have status to bring an action. We are currently gathering materials on this topic and some preliminary research has been undertaken.

While we are unable to predict when a comprehensive Working Paper will be prepared, our preliminary work has identified one issue on which we believe immediate action is desirable. That issue concerns the status of the so-called "common law spouse" to apply for relief. We expect to submit a minor Report on this issue early in 1983.

## 3. Applicability of English Statute Law

Section 2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 provides that the laws of England, as they existed on November 19, 1858 are in force in British Columbia to the extent that they are not inapplicable through local

circumstances and have not been repealed or superseded by federal or provincial legislation. It follows from this that an uncertain number of English statutes are in force in this Province.

The aim of this project is to introduce a degree of certainty concerning the extent to which English statute law is in force here. We hope to identify those statutes which are in force, with a view to rationalizing this aspect of our statute law.

This has always been recognized as a long-term project and much of our work has been devoted to gathering background information. Considerable progress has been made in organizing these materials, and a preliminary list of statutes has been established.

During 1982, the pressure of other projects precluded any concentrated work on this study, and this situation is likely to continue for some time. We wish, however, to reaffirm our commitment to the project and hope that those awaiting a Report will bear with us.

## 4. Arbitration

The law covering Arbitration has been the subject of intense work by the Commission for the past several years. In May this work culminated in the submission of our final Report on Arbitration. The focus of our attention is commercial arbitration and the imperfections of the existing *Arbitration Act*. The recommendations in the Report are aimed at modernizing the Act, which has remained substantially unaltered since 1893 when it was first enacted, and curing many anomalies in the law of arbitration. Of particular note are the recommendations concerning the judicial review of arbitration awards.

## 5. Civil Procedure

### (a) *Foreign Money Liabilities*

From time to time, a Canadian court will hear a case in which the plaintiff's claim is properly stated in a foreign currency. This foreign currency element may reflect an agreement between the parties or be a result of the circumstances in which the defendant's liability arose. A common example is the purchase of goods, by a Canadian, from a foreign supplier, with the purchase price to be paid in the supplier's currency. In times of rapidly fluctuating currency exchange rates the rules which the courts apply to determine the nature and extent of the defendant's liability may be of crucial importance to the parties.

Until the beginning of the last decade the Anglo-Canadian law concerning foreign currency claims seemed firmly settled. Two propositions were cited as fundamental. The first was that the courts have no authority to enter money judgments in terms of a "foreign" currency—that is, a currency other than that of the forum. The second is that in converting from a foreign currency to the currency of the forum the court should have regard to the exchange rate that prevailed on the date of breach—the date the loss was suffered by the plaintiff or when the obligation to him became payable.

This legal position has recently undergone a radical change in England. A series of cases in the 1970's culminated in *Miliangos* v. *George Frank (Textile) Ltd.*, [1976] A.C. 443, in which the House of Lords declared that it would be permissible to enter judgment directly in a foreign currency or its sterling equivalent at the date of payment.

Late in 1981 the Commission circulated a Working Paper which examined the recent English developments, the reaction of Canadian Courts to them, and the desirability of a similar change in a Canadian context.

This Working Paper has generated a surprisingly large number of useful responses, both from across Canada and from the United Kingdom. The Commission hopes to submit a final Report in 1983.

(b) *Peremptory Challenges and Civil Jury Trials*

In a civil action that will be heard by judge and jury, both plaintiff and defendant may exercise certain powers to determine whether a prospective juror may be included in the jury. Any party may challenge a prospective juror for cause. If the juror is not qualified under the *Jury Act*, or is personally interested in the case or otherwise biased, he should not be part of the jury. Provided the parties are aware of cause, they may challenge on that basis.

In many cases, however, parties will not have that information. Consequently, in addition to challenges for cause (which are unlimited) each party may exercise four peremptory challenges. A peremptory challenge is merely the right to forbid, without reasons, a person from sitting on the jury.

The right to make a peremptory challenge is provided by section 18 of the *Jury Act*. Problems arise from that section. For example, if there are two defendants, may they each exercise four peremptory challenges, or must they share those challenges? In what order should challenges be exercised, as between plaintiff and defendant, and as between several plaintiffs and several defendants? Is a third party to the action entitled to exercise peremptory challenges? Because these issues are either unresolved or not addressed in the *Jury Act*, they can lead to procedural arguments each time they arise, contributing to delays in the administration of civil justice.

In November the Commission distributed a Working Paper setting out proposals for amendments to the *Jury Act* designed to clarify the rights of the parties in these circumstances.

(c) *The Review of Jury Awards*

Although the role of the civil jury is to make findings of fact in the case before them, in certain circumstances the law may permit the trial judge to take the case away from the jury or to direct a new trial. The Court of Appeal also has jurisdiction in some cases to review jury awards. The circumstances when the trial judge or the Court of Appeal may intervene, however, are fairly circumscribed and, even where the circumstances clearly warrant judicial intervention, the procedures which surround it and the results which flow from it often result in unnecessary cost and expense to the parties.

The Commission has undertaken a study of the review of jury awards and is in the process of developing a Working Paper which examines the current law and the need for and possible directions of modification to it. This project was, in part, the result of a suggestion from the Attorney General.

(d) *Interest and Jurisdictional Limits in the County and Provincial Courts*

Earlier in 1982 the Commission's attention was drawn to an apparent anomaly in the way in which the monetary jurisdiction of the Provincial Courts and of the County Courts is defined. It raised an issue which the Commission believed deserved attention but which did not warrant the publication of a full-scale Report. Accordingly, in July 1982 the problem, and the

Commission's recommendation as to its solution, were submitted to the Attorney General, as a minor Report, in a letter under the hand of the Chairman. The text of that letter is reproduced as Appendix C to this Report.

6. ESTATES PROJECTS

A number of discrete studies are being carried out under this heading which are more particularly described below. We are fortunate to have the assistance and advice of J. C. Scott-Harston, Q.C. in connection with these studies and wish to express our gratitude for the time and effort he has devoted to them.

(a) *The Interpretation of Wills*

Once a will has been admitted to probate, doubts may arise concerning the meaning of the words used by the testator. Over several hundred years the law has developed a bewildering array of rules concerning the construction of words used in a will.

In December, the Commission submitted its final Report on this topic. Recommendations set out in the Report concern the modification of certain exclusionary rules of evidence which limit the material courts may consider when interpreting a will. The rules of construction are critically examined and recommendations made respecting their proper role. The court's power to correct a will which imperfectly records the testator's intention is considered and recommendations to enhance this power are made. The overall effect of the Commission's recommendations is to enable the courts to ascertain more readily, and give effect to, the testator's true intentions.

(b) *Statutory Succession Rights*

The right of a person to succeed to the property of another on death may arise by will or by statute. In our Reports on the Making and Revocation of Wills and on the Interpretation of Wills, we were concerned mainly with testamentary succession rights. In this part of the project we examine rights which flow from statute, and which exist regardless of a deceased person's intent. These rights may be mandatory, such as those which arise upon an intestacy under the *Estate Administration Act*, or they may be discretionary like those accorded to certain persons under the *Wills Variation Act*.

A number of fundamental issues arise. Who should enjoy a statutory succession right? On what basis should courts interfere with other vested rights in exercising their discretion under the *Wills Variation Act*? What relief should be granted under such an act? What should be the position of a surviving spouse having regard to interests that may arise upon marriage breakdown under the *Family Relations Act*?

In July, the Commission distributed a Working Paper which explored these issues. Responses are still being received and we expect to start work toward the development of a final Report in 1983.

(c) *Presumptions of Survivorship*

Entitlement to a portion of a decedent's estate depends upon the beneficiary surviving him, if only for an instant. But, because the beneficiary may die at the same time as the decedent or in circumstances where it cannot be determined who lived longer, certain legal presumptions are necessary. The *Survivorship and Presumption of Death Act* provides that death is presumed to

occur in order of seniority. For a variety of reasons this approach is unsatisfactory. It conflicts with other legislation and leads to anomalies.

In November, the Commission submitted a Report on this topic. Recommendations were made aimed at rationalizing the law in this area.

(d) *The Effect of Testamentary Instruments*

Even where the testator's original intent is beyond dispute, events may occur which render it impossible to give effect to his intent. A beneficiary may predecease the testator. Property disposed of by will may have become altered in form. In this part of the Estates Project the Commission will examine a number of issues arising out of such occurrences. In particular, we will examine the legal rules concerning lapse, ademption, conversion, election and disclaimer.

(e) *Probate Procedure and Administration*

It is planned that this study will examine the law of British Columbia concerning the procedure used in obtaining letters probate or letters of administration, and the law relating to the administration of the estates of deceased persons, with a view to its consolidation, rationalization, and simplification. It will also cover the procedural implications of recommendations made in other parts of the project. Since changes in the law concerning procedure depend to some extent upon the substantive law, it is anticipated that aspects of the work on this topic will be deferred until the completion of the other parts of the Wills and Estates Project.

The approach which we hope to adopt is to constitute a special committee to identify and examine the issues and to assist the Commission with their views and experience.

7. Office of the Sheriff

This study entails a comprehensive examination of the powers and duties of the sheriff and current practices in the day-to-day operation of the sheriff's office. An historical review of the evolution of the sheriff's office in British Columbia and an examination of the practice in other jurisdictions is also being undertaken. Work on this study continued in 1982 and substantial progress was made on that part of the study concerning the duties of the sheriff in relation to execution. We wish to express our gratitude to Professor Elizabeth Edinger of the Faculty of Law, University of British Columbia for her work on this aspect of the project. We also wish to repeat our thanks to the Law Foundation for specific financial support they have given the study. While this study has taken somewhat longer than originally envisaged, we are confident it has now entered its final stages and a useful work will emerge in due course.

8. Illegal Contracts

As a general rule, Canadian courts decline to grant relief to parties who have either deliberately or unwittingly entered into an "illegal" contract. The law concerning when a contract may be characterized as illegal, and the exceptions to the general rule, are uncertain and inconsistent. It may be doubted whether the drastic results which flow from characterizing a contract as "illegal" are necessary to uphold public policy.

In November, a Working Paper was circulated, examining the issues arising out of a total or partial abrogation of the general rule denying relief to the parties to an illegal contract.

9. COVENANTS IN RESTRAINT OF TRADE

This study is an "offshoot" of our work on illegal contracts. Covenants in restraint of trade are one particular type of illegal contract which we thought warranted separate treatment. Typically, such a covenant will arise on a sale of a business and its goodwill, and requires that the seller not carry on a competing business.

The law relating to covenants in restraint of trade is difficult and complex, and the Commission hopes to develop proposals aimed at simplifying and improving the law in this area.

10. ASPECTS OF FAMILY LAW

(a) *Interspousal Immunity in Tort*

In June, the Commission distributed a Working Paper which examines the rule enshrined in section 10 of the *Married Women's Property Act* that, with limited exceptions, one spouse cannot sue the other in tort. We also examined the implications of a change in this rule with respect to insurance legislation and insurance contracts.

(b) *Miscellaneous Causes of Action*

There are a number of causes of action which are concerned with the interests of individuals in their family relationships. Some are based on tort, such as actions relating to the enticement or harbouring of a spouse or child or claims arising out of a personal injury to a family member. Others are founded on statute, such as an action for damages for adultery under section 76 of the *Family Relations Act*. In this study, these and similar causes of action will be examined to determine whether they still serve a useful function, and whether any new remedies would be desirable in this context.

(c) *Breach of Promise of Marriage*

Related to the "miscellaneous causes of action" is the action for breach of promise of marriage. Although such actions are based on contract, they raise similar issues of principle. Early in 1983 we hope to circulate a Working Paper which examines the present law in this area and sets out proposals for reform.

11. COMPETING RIGHTS TO MINGLED PROPERTY: TRACING AND THE RULE IN CLAYTON'S CASE

When trust monies are mingled in a single trust account, and the balance falls below the amount required to satisfy or repay the trust monies, the courts may determine entitlement to the fund by applying the rule in *Clayton's Case; Devaynes* v. *Noble* (1816), 1 Mer. 572, 35 E.R. 767. This rule provides a presumption that the sum first paid into the account is the sum first paid out.

The rule works well for many purposes but it operates harshly when the monies of more than one beneficiary are involved in a mixed fund which is depleted and the competition is between innocent parties. A beneficiary, merely because his money was deposited first in time, may be required to bear the entire shortfall.

In November, the Commission circulated a Working Paper setting out proposals aimed at modifying the application of the rule in *Clayton's Case*. It also sets out proposals aimed at widening the availability of equitable tracing principles generally.

12. DEFAMATION

In 1982 the Commission added a general study of the law of defamation to its program. In the past the Commission has examined discrete aspects of that body of law such as Cable Television and Defamation and the need for a larger study was pointed out in our Report on that topic (LRC 50).

No decision has yet been taken concerning the precise terms of reference for the study or the approach the Commission will take to it. The possibility of constituting a special committee is being considered. We expect to deal with these preliminary matters in 1983.

13. SUBJECTS OF INTEREST

Preliminary research or the gathering of material is proceeding on a number of matters which are not yet part of the Commission's program. In most cases this is to determine if a particular topic is appropriate for formal inclusion in the program as a Commission project.

Many of these matters which are under preliminary consideration arise out of particular suggestions made, and problems drawn to the Commission's attention, by the legal profession and members of the public.

Some of the areas which we are currently monitoring as subjects of interest are:

prejudgment interest
disaster relief funds
payments into court and offers to settle
lay-away plans and deposits
privileged documents.

## VI THE AVAILABILITY OF COMMISSION PUBLICATIONS

All final Reports on major topics issued by the Commission have been published in a typeset format, with the intention that they be available to the public. Our Annual Reports are distributed by the Commission and are available on request and free of charge so long as stocks last.

From time-to-time the Commission also submits minor Reports, in the form of a letter to the Attorney General. These minor Reports are usually reproduced in full as appendices to the Annual Report which covers the year in which the minor Report was made.

The Provincial Queen's Printer is responsible for the distribution of all Reports made by the Commission on particular topics. A nominal charge is made for copies of those Reports. Orders and inquiries as to prices should be directed to:

The Queen's Printer
Publications
Parliament Buildings,
Victoria, B.C. V8V 4R6
Telephone: 387-1901.

A number of our early Reports are now out of print and are not available for purchase. Those Reports are indicated with an asterisk in Appendix A.

The Queen's Printer maintains a "notification list" and upon publication of a Commission Report, all persons on the list are so advised. Anyone who wishes to be added to that list should contact the Queen's Printer.

Working Papers are produced in a typescript format by an offset process (in 1982 the Commission adopted a smaller format for its Working Papers), and the Commission is responsible for their distribution. Working Papers are usually produced in limited quantities and our supplies of them are invariably exhausted by, or shortly after, their initial distribution. Usually, therefore, we are unable to respond to requests for copies of past Working Papers.

## VII THE IMPACT OF COMMISSION RECOMMENDATIONS

All the Reports made by the Commission are listed in Appendix A together with a note of the legislation implementing recommendations made in those Reports. We think it helpful, however, to highlight developments during the past year based upon recommendations the Commission has made.

### A. LEGISLATION

In its Report on the *Replevin Act* (LRC 38) the Commission recommended that the Act (the *Replevin Act* was retitled the *Recovery of Goods Act* in the 1979 Revised Statutes) be repealed and replaced by a new more general remedy contained in the Rules of Court permitting the interim recovery of personal property. This new remedy was embodied in a revised Rule 46 added to the rules by regulation in 1981 (B.C. Reg. 467/81). That regulation came into effect on March 1, 1982. Later in 1982 the process of reform was completed by the repeal of the *Recovery of Goods Act* and by consequential amendments to other statutes. *See Attorney General Statutes Amendment Act*, S.B.C. 1982, c. 46 § 3–6, 25, 37–41.

In addition to legislation implementing its Reports there are other indicators of Government interest in the work of the Commission. Some Reports, because of their length and the number of recommendations, cannot be implemented overnight. It may take years for some to reach the legislature. A number of Reports have resulted in consultative documents being circulated by Government for the purpose of generating further comment.

An example of this occurred in 1982 with the circulation, by the Minister of Intergovernmental Affairs, of a "Green Paper" entitled "Discussion Proposal for a New Expropriation Act." This paper set out a proposed new Expropriation Act which reflects, in large measure, the recommendations made by this Commission in 1971 in its Report on Expropriation (LRC 5).

### B. THE NON-LEGISLATIVE ROLE OF THE COMMISSION'S WORK

The work of the Commission also has a non-legislative impact, both in Canada and abroad. Within British Columbia its Reports are, from time to time, cited as authorities in judgments of both the Supreme Court and the Court of Appeal. Recent examples are the decisions in the following cases:

*J.R.S. Holdings* v. *Corporation of the District of Maple Ridge*, [1981] 4 W.W.R. 632 (B.C.S.C.)

*Board of Industrial Relations* v. *Canadian Imperial Bank of Commerce*, (1981) 38 C.B.R. 126 (B.C.C.A.)

*A.J. Seversen Inc.* v. *Qualicum Beach*, [1982] 4 W.W.R. 374 (B.C.C.A.)

Outside British Columbia, the Commission's work has been cited and considered extensively by other law reform bodies and in legal texts and periodicals. Recent examples of the Commission's work being considered here and abroad include the following:

> Article—"Waiving Conditions," published in The Solicitors' Journal, (England), (1982) Vol. 126 at 72.
>
> Article—"The Registration of Security Interests in Chattels," published in The Australian Law Journal, (1981) Vol. 55 at 649.
>
> "Note on Recovery of Money Paid Under a Mistake of Law," published in the Law Society's Gazette (England) of May 13, 1981.
>
> Commentary—"Foreign Money Liabilities, Law Reform Commission of British Columbia, Working Paper No. 33," (1982) 6 Can. Bus. L.J. 352

Another form of adoption of the Commission's work lies in the extent to which its recommendations are accepted by the Uniform Law Conference of Canada in its task of developing Uniform legislation suitable for adoption in all Provinces. In 1982 two Uniform Acts were adopted which reflect the impact of Commission work. The Conference adopted a new Uniform *Limitation of Actions Act* which adopts many features of the *Limitations Act* recommended by this Commission in its Report on Limitations (LRC 15, 1974). A new *Model Uniform Personal Property Security Act* was also promulgated jointly with the Canadian Bar Association. While the final version of the new Uniform Act is based on intensive work by a special committee (which included a member of the Law Reform Commission: Mr. Arthur Close) over the past six years, a number of features of the new Act reflect ideas and innovations which first emerged in our Report on Personal Property Security (LRC 23, 1975).

## VIII ACKNOWLEDGEMENTS

As we have pointed out in previous Annual Reports, our policy of doing the greater part of our research work internally, rather than relying upon outside consultants, has placed a heavy burden of responsibility upon the shoulders of our permanent staff. As usual they have responded to the challenge with energy, enthusiasm and careful scholarship.

Our current research staff consists solely of Mr. Thomas G. Anderson, Counsel to the Commission. Mr. Anderson's loyalty and industry were invaluable to the Commission during 1982. The Working Papers which we issued on Statutory Succession Rights and Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case are two examples of Mr. Anderson's careful scholarship and lucid exposition. We wish to thank him for his very significant contribution to our work.

We also wish to repeat our thanks to Mr. Anthony J. Spence, former Counsel to the Commission for his dedicated contribution to the work of the Commission both in 1982 and in previous years.

Special mention should also be made of two other individuals. The first is J. C. Scott-Harston, Q.C., who has acted as our consultant in connection with our estates projects. His wide learning and long experience have been a great asset to us. The second is Mr. Duncan Brown, a third-year law student who was engaged by the Commission for the summer of 1982. He cheerfully

undertook a significant portion of the more tedious work of verifying authorities and other technical editorial aspects of producing a Commission document. We are happy to have had him with us.

Our support staff also make a notable contribution to the work of the Commission. They bring intelligence and efficiency to their duties and share a concern that our work should be of the highest quality in every respect. Our support staff presently consists of Sharon St. Michael, Secretary to the Commission, and Terry Lesperance, clerk-stenographer. We thank them for their efforts on our behalf. We also wish to acknowledge the services of Miss Janet Ellis who served as a Commission stenographer until November of 1982.

The Judges' Law Reform Committee is also important to our operation. This Committee provides a continuing point of contact with the judiciary. The members of the Committee are The Honourable Mr. Justice Lambert of the Court of Appeal (Chairman), The Honourable Mr. Justice Taylor, The Honourable Mr. Justice Hinds, The Honourable Mr. Justice Spencer and The Honourable Mr. Justice Macdonald of the Supreme Court, and His Honour Judge Collings of the Provincial Court. The members of the Committee assist us through responding to our working papers and other consultative documents and through bringing to our attention defects in the law that they are well-situated to identify. They bring a unique perspective to bear on our work and we are grateful for their participation.

The support which we have received from the organized bar and its individual members in past years continued in 1982. We rely heavily on the assistance of the legal profession in a number of ways. At the research stage of our projects, individual lawyers assist us in gathering facts and in acting as a "sounding board" with respect to various approaches to difficult issues. Requests for help of this kind are invariably the subject of a generous response. At the more formal stage of consultation, various Sections of the British Columbia Branch of the Canadian Bar Association assist us in our deliberations with thoughtful submissions on the various proposals and tentative conclusions set out in our Working Papers. We wish to thank all members of the bar who gave generously of their time and experience in the past year.

The two law schools in the Province have also greatly assisted us in our consultation processes. Procedures have been established which facilitate and co-ordinate comment from faculty members. The response we have received in this way has been most valuable. We wish particularly to thank Dean Peter Burns of the Faculty of Law, University of British Columbia and Dean L. R. Robinson of the Faculty of Law, University of Victoria and their colleagues.

Two agencies of Government also call for special mention. The first is the Office of Legislative Counsel. Their personnel are invariably responsive and helpful when we request assistance in the preparation of proposed legislation. The new draft *Arbitration Act* appended to our Report on Arbitration reflects the drafting skills they have put at our disposal.

The other agency is the Queen's Printer who is responsible for printing our Reports. Its personnel bring a high level of skill and dedication to the work they do for us and we are pleased to take this opportunity to thank them and acknowledge their important role.

Finally, we wish to repeat our most sincere thanks to the Law Foundation of British Columbia for responding so positively to our urgent request for funding. The support of "law reform" is listed as one of the Foundation's

objects in the statute under which it is constituted. In 1982 it truly fulfilled that object and, in preserving the Law Reform Commission as an entity which is able to carry on with its functions, has rendered an important service to the people of the Province. Our particular thanks go to Mr. Norman Severide, Chairman of the Foundation, and Mr. Michael Jacobsen, its Executive Director. Both spent a great deal of time with Commission representatives and assisted us throughout.

JOHN S. AIKINS
KENNETH C. MACKENZIE
BRYAN WILLIAMS
ANTHONY F. SHEPPARD
ARTHUR L. CLOSE

1 January 1983

## Appendix A

## REPORTS AND RECOMMENDATIONS MADE BY THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

| No. | Title | Date | Recommendations Implemented in Whole or in Part by |
|---|---|---|---|
| 1 | Limitations—Abolition of Prescription* | Dec. 1970 | *Land Registry (Amendment) Act, 1971*, S.B.C. 1971, c. 30 (see now *Land Title Act*, R.S.B.C. 1979, c. 219, s. 24). |
| 2 | Annual Report, 1970* | Dec. 1970 | Not applicable. |
| 3 | Frustrated Contracts Legislation* | Feb. 1971 | *Frustrated Contracts Act*, S.B.C. 1974, c. 37 (see now *Frustrated Contract Act*, R.S.B.C. 1979, c. 144); *Landlord and Tenant Act*, S.B.C. 1974, c. 45, s. 61 (e) (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365 s. 8 (3)); *Commercial Tenancies Act*, R.S.B.C. 1960, c. 207, s. 34 (see now *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 33). |
| 4 | Debt Collection and Collection Agents | Mar. 1971 | *Debt Collection Act*, S.B.C. 1973, c. 26 (see now *Debt Collection Act*, R.S.B.C. 1979, c. 88). |
| 5 | Expropriation | Dec. 1971 | ——— |
| 6 | Annual Report, 1971* | Dec. 1971 | Not applicable. |
| 7 | Mechanics Lien Act | June 1972 | ——— |
| 8 | Deficiency Claims and Repossessions | June 1972 | *Conditional Sales Act*, S.B.C. 1973, c. 19 (see now *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373); *Bills of Sale Act*, S.B.C. 1973, c. 7 (see now *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48). |
| 9 | Legal Position of the Crown | Dec. 1972 | *Crown Proceedings Act*, S.B.C. 1974, c. 24 (see now *Crown Proceeding Act*, R.S.B.C. 1979, c. 86); *Interpretation Act*, S.B.C. 1974, c. 42, s. 13 (see now *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14). |
| 10 | Annual Report, 1972 | Dec. 1972 | Not applicable. |
| 11 | Interim Report on Evidence | Feb. 1973 | *Attorney-General Statutes Amendment Act*, 1975, S.B.C. 1975, c. 4, s. 6 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, s. 38). |
| 12 | Pre-Judgment Interest | May 1973 | *Prejudgment Interest Act*, S.B.C. 1974, c. 65 (see now *Court Order Interest Act*, R.S.B.C. 1979, c. 76). |

* Report is out of print.

| No. | Title | Date | Recommendations Implemented in Whole or in Part by |
|---|---|---|---|
| 13 | Landlord and Tenant—Residential Tenancies | Dec. 1973 | *Landlord and Tenant Act*, S.B.C. 1974, c. 45 (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365). |
| 14 | Annual Report, 1973 | Jan. 1974 | Not applicable. |
| 15 | Limitations—General | Mar. 1974 | *Limitations Act*, S.B.C. 1975, c. 37 (see now *Limitation Act*, R.S.B.C. 1979, c. 236). |
| 16 | Costs of Accused on Acquittal | June 1974 | ——— |
| 17 | Procedure Before Statutory Bodies | Nov. 1974 | ——— |
| 18 | A Procedure for Judicial Review of the Actions of Statutory Bodies | Dec. 1974 | *Judicial Review Procedure Act*, S.B.C. 1976, c. 25 (see now *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209). |
| 19 | Annual Report, 1974 | Jan. 1975 | Not applicable. |
| 20 | Costs of Successful Unassisted Lay Litigants | Apr. 1975 | ——— |
| 21 | The Termination of Agencies | Apr. 1975 | ——— |
| 22 | Powers of Attorney and Mental Incapacity | May 1975 | *Attorney-General Statutes Amendment Act, 1979*, S.B.C. 1979, c. 2, s. 52 (see now *Power of Attorney Act*, R.S.B.C. 1979, c. 334, s. 7). |
| 23 | Personal Property Security | Oct. 1975 | ——— |
| 24 | Security Interests in Real Property: Remedies on Default | Dec. 1975 | *Miscellaneous Statutes (Court Rules) Amendment Act*, S.B.C. 1976, c. 33, s. 94 (a) [in part] (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 16); Supreme Court Rules, Rule 50 (11) 3 (2) [in part]; *Land Titles Act*, S.B.C. 1978, c. 25 [in part] (see now *Land Title Act*, R.S.B.C. 1979, c. 219); *Attorney General Statutes Amendment Act*, S.B.C. 1980, c. 1, s. 15 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 21.1) [in part]. |
| 25 | Annual Report, 1975 | Jan. 1976 | Not applicable. |
| 26 | Minors' Contracts | Feb. 1976 | ——— |
| 27 | Extra-Judicial Use of Sworn Statements* | Apr. 1976 | See, e.g., *Mineral Act, 1977*, S.B.C. 1977, c. 54, s. 20 (2). |
| 28 | Rule in *Bain* v. *Fothergill* | June 1976 | *Conveyancing and Law of Property Act*, S.B.C. 1978, c. 16, s. 35 (see now *Property Law Act* R.S.B.C. 1979, c. 340, s. 33). |

* Report is out of print.

| No. | Title | Date | Recommendations Implemented in Whole or in Part by |
|---|---|---|---|
| 29 | Annual Report, 1976 | Dec. 1976 | Not applicable. |
| 30 | The Rule in *Hollington* v. *Hewthorn* | Jan. 1977 | *Evidence Amendment Act, 1977*, S.B.C. 1977, c. 70 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, ss. 15 (3), 80, 81). |
| 31 | Waiver of Conditions Precedent in Contracts | Apr. 1977 | *Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 49). |
| 32 | Proof of Marriage in Civil Proceedings | Apr. 1977 | *Attorney-General Statutes Amendment Act, 1979*, S.B.C. 1979, c. 2, s. 18 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, s. 58). |
| 33 | The *Statute of Frauds* | June 1977 | ——— |
| 34 | Tort Liability of Public Bodies | June 1977 | ——— |
| 35 | *Offences Against the Person Act, 1828*, Section 28 | Aug. 1977 | *Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 3). |
| 36 | Annual Report, 1977 | Jan. 1978 | Not applicable. |
| 37 | *Absconding Debtors Act* and *Bail Act*: Two Obsolete Acts | Mar. 1978 | *Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8. |
| 38 | The *Replevin Act* | May 1978 | Rules of Court, Rule 46 as amended Nov. 26, 1981 by B.C. Reg. 467/81. *Attorney General Statutes Amendment Act, 1982*, S.B.C. 1982, c. 46, § 3–6, 25, 37–41. |
| 39 | The *Attachment of Debts Act* | Oct. 1978 | ——— |
| 40 | Execution Against Land | Oct. 1978 | ——— |
| 41 | Annual Report, 1978 | Jan. 1979 | Not applicable. |
| 42 | Creditor's Relief Legislation: A New Approach | Jan. 1979 | ——— |
| 43 | Guarantees of Consumer Debts | June 1979 | *Consumer Protection Amendment Act 1980*, S.B.C. 1980, c. 6, s. 3. [in part]. |
| 44 | Parol Evidence Rule | Dec. 1979 | ——— |
| 45 | Annual Report 1979 | Jan. 1980 | *Attorney General Statutes Amendment Act, 1980*, S.B.C. 1980, c. 1, ss. 7, 17 (Limitation periods in actions against estates) (see now *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66 (4) (b); *Negligence Act*, R.S.B.C. 1979, c. 298, s. 7 (3)). |

| No. | Title | Date | Recommendations Implemented in Whole or in Part by |
|---|---|---|---|
| 46 | Civil Litigation in the Public Interest | June 1980 | ——— |
| 47 | Calculation of Interest on Foreclosure | Sept. 1980 | *Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 28 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 18.1). |
| 48 | The Recovery of Unauthorized Disbursements of Public Funds | Sept. 1980 | *Financial Administration Act*, S.B.C. 1981, c. 15, s. 67. |
| 49 | Annual Report 1980 | Jan. 1981 | *Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 30 (Discount Rates) (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51). |
| 50 | Cable Television and Defamation | March 1981 | ——— |
| 51 | Benefits Conferred Under a Mistake of Law | Sept. 1981 | ——— |
| 52 | The Making and Revocation of Wills | Sept. 1981 | ——— |
| 53 | Distress for Rent | Nov. 1981 | ——— |
| 54 | Annual Report 1981 | Jan. 1982 | Not applicable. |
| 55 | Arbitration | May 1982 | ——— |
| 56 | Presumptions of Survivorship | Nov. 1982 | ——— |
| 57 | Crown as Creditor: Priorities and Privileges | Nov. 1982 | ——— |
| 58 | Interpretation of Wills | Nov. 1982 | ——— |
| 59 | Interest and Jurisdictional Limits in the County and Provincial Courts | July 1982 | ——— |

## Appendix B

## MATTERS UNDER CONSIDERATION BY LAW REFORM COMMISSION OF BRITISH COLUMBIA

1. Debtor-Creditor Relationships
   (a) Reviewable Transactions
   (b) Bulk Sales Legislation
   (c) Joint Liability
2. Personal Injury Compensation
   (a) Compensation for Non-Pecuniary Losses
   (b) *Family Compensation Act*
3. Statute Law Revision: Applicability of English Law
4. Civil Procedure
   (a) Foreign Money Liabilities
   (b) Peremptory Challenges in Civil Jury Trials
   (c) The Review of Jury Awards
5. Estates Projects
   (a) Statutory Succession Rights
   (b) The Effect of Testamentary Instruments
   (c) Probate Procedure and Administration
6. Office of the Sheriff
7. Illegal Contracts
8. Covenants in Restraint of Trade
9. Aspects of Family Law
   (a) Interspousal Immunity in Tort
   (b) Miscellaneous Causes of Action
   (c) Breach of Promise of Marriage
10. Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case
11. Defamation

## Appendix C

## MINOR REPORT (LRC 59)

July 14, 1982

The Hon. Allan Williams, Q.C.
Attorney General of the Province
of British Columbia
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

*Re:* Interest and Jurisdictional Limits
*in the County and Provincial Courts*

The *Court Order Interest Act*, R.S.B.C. 1979, c.76 (formerly entitled the *Prejudgment Interest Act*) was enacted in 1974 to implement recommendations made in a Report (LRC 12) submitted by the Commission in 1973. The Commission has been monitoring the operation of the Act with a view to isolating any difficulties that have emerged that might be remedied by legislation. Complementing our work is the work of the Uniform Law Conference of Canada aimed at developing a *Uniform Prejudgment Interest Act* suitable for adoption across Canada. That body will be considering a draft Act at its meeting in August 1982.

An issue has arisen, however, which the Commission believes can be dealt with independently of any broad study and without amending the *Court Order Interest Act*. In *Buckler* v. *Earthwood Manufacturing Ltd.*, [1980] B.C.D. Civ. 2058-08, (1981) 18 C.P.C. 223, (B.C. Co. Ct.), it was held that prejudgment interest must be taken into account when determining whether a claim falls within the monetary jurisdiction of the Provincial Court as prescribed by section 4 (e) of the *Small Claims Act*, R.S.B.C. 1960, c. 359. section 4 (e) provided:

> 4. Every judge, among other powers conferred by this Act, has jurisdiction in the following cases:
>
> (e) in all other personal actions where the debt or damages claimed does not exceed $2,000;

This section was carried forward in substantially the same terms in the Revised Statutes of 1979 as section 2 (1) (e) of the *Small Claim Act*, 1979, c. 387. That section provides:

> 2 (1) The court, among other powers, has jurisdiction in
>
> (e) all other personal actions where the debt or damages claimed does not exceed $2,000.

The *Small Claim Act*, R.S.B.C. 1979, c. 387 was amended in 1981 to make it clear that the substitution of "court" for "judge" did not change the law. Section 65 of the *Miscellaneous Statutes Amendment (No. 1), 1981 Act*, S.B.C. 1981, c. 20 provides:

> **65.** Section 1 of the *Small Claim Act*, R.S.B.C. 1979, c. 387, is amended by renumbering it as section 1 (1) and by adding the following:
>
> (2) Where a provision in the former Act referred to a judge, and a corresponding provision of this Act altered under the Revised Statutes Act, S.B.C.1966, c. 42, refers to a court, the change to "court" has not changed the law.

In the *Buckler* case, the plaintiffs commenced an action in the County Court, claiming the sum of $2,000 plus prejudgment interest. The defendants moved to have the action struck out for want of jurisdiction, claiming that the matter should have been brought in the Provincial Court. The question before the Court was whether the claim for prejudgment interest was within the words "debt . . . claimed", with the result that the plaintiff's claim would exceed $2,000 and would, therefore, be within the jurisdiction of the County Court and beyond the jurisdiction of the Provincial Court. It was held that the claim for interest was part of the "debt . . . claimed;" consequently, the action was within the jurisdiction of the County Court.

In so holding, the Court purported to follow the Court of Appeal's decision in *Kellner* v. *Greig*, (1979) 103 D.L.R. (3d) 244, where it was held, on the ground that the *Court Order Interest Act* gives a plaintiff a claim to interest which the Court has no discretion to refuse, that interest is a "claim" for which the plaintiff sues and, therefore, falls within the meaning of the word "claim" as used in Rule 37 (1) of the Rules of Court. Under Rule 37 (1), a defendant, at any time before trial, may pay a sum of money into Court in satisfaction of "the whole or part of the plaintiff's claim." The plaintiff receives notice of the payment in and may elect to accept the money paid in "and take out of Court the whole sum or any one or more of the specified sums paid in satisfaction of his claim or claims." If the plaintiff does not accept the payment into Court and proceeds to trial and recovers an amount equal to or less than the amount paid into Court, he is only allowed those costs reasonably incurred up to delivery of the notice of payment in and, provided the notice was delivered at least seven days prior to the commencement of the trial, the defendant is entitled to costs reasonably incurred after delivery of the notice.

The effect of the ruling in *Keller* v. *Grieg* is set out in the headnote as follows:

> For the purposes of determining the right to costs after the date of a payment into Court, a plaintiff is entitled to add to the amount recovered by way of damages the amount awarded by way of prejudgment interest. Accordingly, although the plaintiff's recovery in damages was for an amount less than the amount paid into Court, where the addition of prejudgment interest results in a net recovery in excess of the payment into Court, the plaintiff is entitled to costs after the date of payment in.

While the Commission does not wish to express an opinion on whether the Court in *Buckler* was correct in construing the ratio in *Kellner* v. *Greig* as applicable to the case before it, we are concerned that the Court's decision raises difficulties. Our principal concern is that uncertainties may arise. A plaintiff, for example, may issue his summons when his total claim, consisting of the debt or damages plus prejudgment interest, up to the date of the issuance of the writ, is within the monetary jurisdiction of the Provincial Court. By the time the matter comes to trial, however, the plaintiff's total claim—because interest does not cease to run—exceeds the monetary jurisdiction of that Court. It is uncertain in this situation whether the Court would still have jurisdiction.

Apart from this pragmatic concern, as a matter of principle the Commission believes that interest should not be taken into account when determining whether a claim is within the jurisdiction of the Provincial Court. As to this we would exclude *any* claim to interest, not only interest under the *Court Order Interest Act*. If only prejudgment interest was excluded when determining the monetary jurisdiction of the Provincial Court, interest would still be taken into

account when it is payable by agreement between the parties. In such cases the interest would be part of the "debt" claimed by the plaintiff. In the result, while the principal owing might be within the monetary jurisdiction of the Court, whether in fact the court has jurisdiction would in some instances depend on whether accrued interest due owing by agreement takes the claim over the jurisdictional limit of $2,000. In our view, interest payable by agreement should be treated in the same way as prejudgment interest, and should not be allowed to determine jurisdiction.

The Commission has concluded that the simplest solution to this problem would be to amend the *Small Claim Act* to make it clear that interest, prejudgment or otherwise, should not be taken into account in determining whether the plaintiff's claim falls within the monetary jurisdiction of the Court. This is the approach adopted in Ontario, where section 55 (a) of the *Small Claims Courts Act*, R.S.O. 1980, c. 476, provides that the Small Claims Court in Ontario has jurisdiction in any action "where the amount claimed does not exceed $1,000 exclusive of interest."

One potential difficulty with the Ontario formulation is that it could lead to a claim for a substantial amount of interest being brought in the Small Claims Court. For example, A lends B $100,000 at 15% per annum interest, after three years B repays $99,000 of the principal, or that amount is appropriated to principal, but nothing has been paid or appropriated in respect of the accummulated interest of $45,000. A's claim against B would be for $1,000 of principal plus accrued interest of $45,000. On the Ontario formulation it is arguable that this claim, which totals $46,000, would be within the jurisdiction of the Small Claims Court. This is an extreme example to demonstrate the point. The situation described, however, may often arise in less extreme forms. In any event, this situation should be guarded against in any amendment to the *Small Claim Act*.

Having in mind the considerations discussed in this letter, the Commission unanimously recommends that section 2 (1) (e) of the *Small Claim Act* be amended by adding the words "exclusive of interest, payable pursuant to the *Court Order Interest Act*, by agreement or otherwise, on the debt or damages claimed." A section in the *Attorney General's Statutes Amendment Act* could suffice. Following the above suggestion it would read:

> Section 2 (1) of the *Small Claim Act*, R.S.B.C. 1979, c. 387 is amended by repealing paragraph (e) and substituting the following:
>
> (e) all other personal actions where the debt or damages claimed does not exceed $2,000 exclusive of interest, payable pursuant to the *Court Order Interest Act*, by agreement or otherwise, on the debt or damages claimed.

This would mean, in the example above, that the Provincial Court would only have jurisdiction to hear a claim for $1,000 of principal, i.e., the debt claimed, plus interest accrued on that amount, but would have no jurisdiction to hear a claim for all of the interest owing, namely the $45,000. To recover that amount, as well as his claim, the plaintiff would have to bring the action in the Supreme Court.

A similar problem exists in connection with the jurisdiction of the County Court. Under section 29 of the *County Court Act*, the County Courts have jurisdiction:

> (a) in all personal actions where the debt, demand or damages claimed do not exceed $25,000.
>
> (b) in any action where the debt or demand claimed consists of a balance not exceeding $25,000, after an admitted set off of any debt or demand claimed or recoverable by the defendant from the plaintiff.

The Commission unanimously recommends that paragraphs (a) and (b) should also be amended by the addition of the words "exclusive of interest, payable pursuant to the *Court Order Interest Act*, by agreement or otherwise." Again, a section in the *Attorney General's Statutes Amendment Act* could suffice. It might read:

> Section 29 of the *County Court Act*, R.S.B.C. 1979, c.72, is amended
> (a) by repealing paragraph (a) and substituting the following:
> (a) in all personal actions where the debt, demand or damages claimed do not exceed $25,000 exclusive of interest, payable pursuant to the *Court Order Interest Act*, by agreement of otherwise, on the debt, demand or damages claimed.
> (b) by repealing paragraph (b) and substituting the following:
> (b) in any action where the debt or demand claimed consists of a balance not exceeding $25,000 exclusive of interest, payable pursuant to the *Court Order Interest Act*, by agreement or otherwise, on the debt or demand claimed, after an admitted set off of any debt or demand claimed or recoverable by the defendant from the plaintiff.

This letter is to be taken as a Report by the Commission recommending changes in the statute law as herein set out. The recommendations for changes in the law set out in this letter were approved by the Commission at a meeting on the 28th of June last.

The issue addressed by the Commission is narrow and free of controversy. In view of this, the Commission decided that it would be inappropriate to send you a full-dress Report and that a less formal report by letter would suffice. Moreover, the Commission decided not to follow its usual practice of preparing and circulating an exhaustive Working Paper for comment and criticism. Instead, we sent draft copies of this letter to the Honourable the Chief Justice of the Supreme Court, His Honour the Chief Provincial Court Judge, His Honour Judge David Campbell of the Vancouver County Court, and the judges of the Judges Law Reform Committee. His Honour Chief Judge Goulet and His Honour Judge Campbell were kind enough to circulate our draft letter to a number of judges of their respective courts. Members of the Judges Committee were to write us only if they saw any difficulties with our proposals. None of them wrote us with any objections. The responses received overwhelmingly favoured implementation of the proposals for change in the law set out in this letter.

I enclose an additional copy of this letter for your convenience. I have taken the liberty of sending additional copies of this letter to the following in your Ministry: R.H. Vogel, Q.C., Robert Adamson, Allan R. Roger, and George Copley.

Yours truly,
Hon. Mr. Justice J.S. Aikins
*Chairman*

JSA/je
Encl.

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Victoria, 1983